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[Lord JUSTICE-CLERK Reporter.]

October 24. 1770.

MEMORIAL

FOR

Mr Robert Hunter of Elrig, professor of Greek in the university of Edinburgh, in the process of division of the muirs of Reddingrig and Whitesiderig,

AGAINST

The Duke of Hamilton, and his Tutors.

THE subject of this memorial is a question to be reported by the Lord Justice-Clerk Ordinary, respecting the interest of the memorialist in the muirs of Reddingrig and Whitesiderig, now under division, viz. Whether he has a right of common property in these muirs, or only that of a servitude?

These muirs of Reddingrig and Whitesiderig lie within the ancient barony of Kerse, which, before the Reformation, was the property of the abbot and convent of Holyroodhouse. They are understood to be the common muirs of the barony, and were possessed in common by pasturage, casting fewel, feal, and divot, by those who possessed the other lands within the barony.

It appears, that, at different periods prior to 1552, the abbots feued out parcels of the foresaid barony, with parts and pertinents, to different persons, to be held by them of the abbot and convent; and particularly, that they had granted charters in their favours, to the predecessors and authors of the Earl of Dunmore, John Sinclair, and the trustees of Drummond of Grange.

After these parts had been so feued out, Robert, commendator of Holyroodhouse, in 1552, granted a feu-charter of a number of lands specially enumerated, being the whole of the barony that remained with the abbot after the feus above mentioned; and, among others, the lands of Whiteside and Redding, to the Duke of Chastelrault, the predecessor of the Duke of Hamilton; and in the *Tenendas* of this charter, there is the following clause. "Cum communi pastura, libero introitu et exitu, et cum omnibus aliis et "singulis libertatibus, commoditatibus, proficuis, aisiamentis, et "justis suis pertinen. quibuscunque, tam non nominatis quam "nominatis, tam subtus terra quam supra terram, procul et prope, "ad prædictas terras, molendina, et piscarias, cum universis et "singulis suis pendiculis respective pertinen." To be held of the abbot for the feu-duties therein mentioned.

About the beginning of the Reformation, the whole lands, property and superiority, of this abbacy, under the exception of the anterior feu-rights, were resigned in the hands of the crown, in favour of Sir Lewis Ballandine of Broughtown, who obtained a charter of resignation and confirmation, with a *Novodamus*, and an erection into a new barony, to be called the *Barony of Broughtown*; and in this manner the Duke of Chastelrault became vassal to Sir Lewis Ballandine, then come in place of the abbot and convent of Holyroodhouse.

William Ballandine, the son and heir of Sir Lewis, sold and disponed to James Marquis of Hamilton, the superiority of the whole lands contained in the above-mentioned feu-charter 1552; upon
Aug. 17. 1611 which the Marquis, of this date, obtained a charter of resignation from the crown, with a clause of *Novodamus*, erecting these lands in his favour into a lordship, barony, and regality, to be called in time coming, the *Lordship, barony, and regality of Abbotskerse.*

The family of Hamilton having in this manner consolidated the property with the superiority, followed out the plan of the abbots of Holyroodhouse, by granting feus from time to time of parcels of their property, upon different conditions, and in different terms. Some of these feu-rights contain a grant in favour of the feuers of the particular lands, with *parts* and *pertinents*; and the rights in favour of others of these feuers, contain a grant of a right and interest in the foresaid muirs *per expressum.*

As by the granting of these feus, a number of different persons came to have rights, either of common property or servitude, upon

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the muirs of Reddingrig and Whitefiderig, and thereby a great tract of land was left uncultivated; ſo to remove this evil, Mr Robert Hunter, proprietor of the lands of Middlerig and Elrig, parts of the foreſaid barony, Robert Johnſton of Overtown, and James Beveridge merchant in Edinburgh, brought an action againſt the Duke of Hamilton, and others, upon act 38. parliament 1695, libelling upon that ſtatute; and ſetting forth, That the purſuers were proprietors of, and ſtand heritably infeft and ſeiſed in the lands and other libelled, and have been in the immemorial poſſeſſion of the common muirs or commonties lying adjacent thereto, commonly called and known by the name of the *Common muirs*, or *Commonties of Reddingrig and Whitefiderig*; and thereupon concluding in common form.

This action came in courſe before the Lord Coalſton Ordinary, who, of this date, ſuſtained the titles of the purſuers for carrying on this proceſs, granted commiſſion, and ordered a plan. July 21. 1761.

In conſequence of this interlocutor, a proof was led and reported, a plan made, and ſundry of the claimants produced their title-deeds. From this production it appeared, that ſome of the titles admitted of a different conſtruction from others; and that therefore, in order to expedite the matter, it would be proper to divide the claimants into different claſſes, and ſo, by conſidering the titles of one or two in each claſs, the rights and intereſts of the whole claimants might be determined.

This method was accordingly followed. The firſt claſs contained the feuers who have feued their lands from the abbots of Holyrood-houſe, anterior to the foreſaid feu-rights, in favour of the Duke of Chaſtelrault, in 1552. The rights in favour of theſe feuers contain a grant of their lands with *parts* and *pertinents*. The heritors in this claſs, are the truſtees of Drummond of Grange, John Sinclair, and the Earl of Dunmore.

The ſecond claſs were ſuch as had procured their feus from the family of Hamilton, and whoſe feu-rights contain a grant of their lands, *with parts and pertinents*.

And the third claſs conſiſted of the feuers of the family of Hamilton, whoſe titles contain an expreſs grant in the diſpoſitive clauſe, of an intereſt in the muirs, by a clauſe generally conceived in the following terms. "With houſes, biggings, yards, moſſes, muirs, "meadows, tofts, crofts, parts, pendicles, and pertinents; together "with the paſturage of cattle, and privilege of commonty, within

"the

" the bounds of the common muir of Reddingrig and Whitefiderig,
" conform to old uſe and privilege, belonging to the ſaid lands,
" and all other liberties and commodities uſed and wont."

Memorials were given in *hinc inde* upon the import of the rights and intereſts of the reſpective claimants in the commonty. The Duke of Hamilton in his memorial, not only contended, that the whole claimants, John Robertſon only excepted, had no more than ſervitudes upon the commonty; but he likewiſe ſet up certain ſeparate claims: and 1*mo*, As ſuperior, he claimed a *præcipuum*; 2*do*, He claimed the excluſive right to the coal in the whole commonty, not only in reſpect that he was ſole proprietor of the commonty, but likewiſe that he and his predeceſſors alone had been in uſe to work coal in the commonty; and 3*tio*, He claimed a conſideration to be given him in the diviſion, in reſpect, that for ſome time paſt, he and his predeceſſors had been in uſe to exact certain tolls and cuſtoms from the perſons who brought cattle to the Tryſt of Falkirk.

July 24 1767. The Lord Ordinary, upon adviſing the whole, of this date, pronounced an interlocutor upon the different points: but repreſentations having been given in, his Lordſhip took the whole to report, and your Lordſhips, upon adviſing informations *hinc inde*, of this

July 30. 1768. date, pronounced the following interlocutor. "The Lords find,
" That the barony of Kerſe did anciently belong to the abbots of
" Holyroodhouſe; and that the muirs of Reddingrig and White-
" fiderig, the ſubject of this diviſion, were part of, and lay locally
" within, the ſaid barony.

" Find, That certain farms of the ſaid barony were feued out,
" with the parts and pertinents, to the predeceſſors and authors of
" the Earl of Dunmore, John Sinclair, and William Drummond
" of Grange; and that the remainder of the ſaid barony was, in
" the year 1552, feued out to the then Duke of Chaſtelrault, who
" thereafter acquired right to the ſuperiority of his own lands;
" which, by the charter under the great ſeal in the year 1611, were
" erected into a barony and regality, called the *Barony and rega-*
" *lity of Abbotſkerſe.*

" Find, That the family of Hamilton did grant feu rights of o-
" ther parts of the ſaid barony to ſundry perſons, predeceſſors
" and authors to the parties in this cauſe; and that theſe feu-rights
" were granted under different qualities and conditions.

" Find in particular, That in the year 1592, a precept of *Clare*

" *conſtat*

" *conſtat* was granted by James Earl of Arran, with conſent of his " tutor and curator, in favour of William Monteith, for infefting " him, as heir of his uncle, in the lands of Overſaltcoats, with " their pertinents, lying in the barony of Kerſe, and ſhire of " Stirling; and that in the year 1647, another precept of *Clare* " *conſtat* was granted by James Marquis, thereafter Duke of Ha- " milton, in favour of Charles Monteith of Randieford, for in- " fefting him, as heir of his father William Monteith of Randie- " ford, in the ſaid lands of Overſaltcoats, with their ſundry per- " tinents; and whereupon infeftment followed the 11th February " 1647, in favour of the ſaid Charles Monteith; from whom Ro- " bert Johnſton and James Beveridge, two of the purſuers, and " John Gib one of the defenders, in this cauſe, derive right, by " progreſs.

" Find it proved, That the ſaid Robert Johnſton, James Beve- " ridge, and John Gib, their predeceſſors and authors, have im- " memorially poſſeſſed the ſaid muirs of Reddingrig and White- " ſiderig, as part and pertinent of the ſaid lands; and therefore " find, That the ſaid Robert Johnſton, James Beveridge, and John " Gib, have a right of common property in the ſaid muirs, effeir- " ing to their reſpective lands; and are intitled to a ſhare in the di- " viſion, according to the valued rent thereof.

" And find, That the whole other defenders, who have made " the like production, and proved the ſame poſſeſſion with the " ſaid Robert Johnſton, James Beveridge, and John Gib, whe- " ther deriving right from the abbots, or from the family of Ha- " milton, are in the like manner to be conſidered as joint proprie- " tors, and intitled to draw a ſhare in the diviſion, according to " their reſpective valued rents.

" Find, That the defender John Robertſon, as ſtanding infeft in " certain parts and portions of the lands of Randieford-Saltcoats, " commonly called the *Two Northwards*, and Biſſet's houſe, with the " houſes, yards, and pertinents, as alſo in a proportional part of the " muir of Reddingrig and Whiteſiderig, effeiring to the valued rent " of the foreſaid lands, confirmed by the family of Hamilton, the " ſuperior, has a right of common property in the ſaid muirs: " And in reſpect thereof, and of the proof adduced on the part of " the ſaid John Robertſon, as alſo the admiſſion of the Duke of " Hamilton, find, That the ſaid John Robertſon is intitled to a

" ſhare of the diviſion, according to the valued rent of his ſaid " lands.

" And further find, That in the year 1633, the then Marquis of " Hamilton did, by feu-contract, diſpone, in favour of David " Livingſton, five oxgangs and half an oxgang of the lands of " Over Polmont, with parts, pendicles, and pertinents, together " with the paſturage of cattle, and privilege of commonty, with- " in the bounds of the common muir of Reddingrig and White- " ſiderig, conform to old uſe and wont: Find it proved, That the " poſſeſſors of the ſaid lands have been immemorially in uſe of " paſturing their cattle, and caſting feuel, feal, and divot, on the " ſaid muirs; but, in reſpect the original grant imports only a " ſervitude, find, That the defender Gilbert Laurie, as deriving " right from the ſaid David Livingſton, is not to be conſidered as " a joint proprietor, but is only intitled to be continued in poſ- " ſeſſion of his ſervitude, till ſuch time as a ſhare ſhall be ſet off " to him, ſufficient to anſwer the ſervitude.

" And find, That the whole other defenders, who are *in pari* " *caſu* with the ſaid Gilbert Laurie, are in like manner to be conti- " nued in poſſeſſion of their reſpective ſervitudes, until ſuch time " as ſhares ſhall be ſet off to them as aforeſaid.

" Find it proved, That the tenants and poſſeſſors of the lands of " Hill of Polmont, Nether Mumerals, Beg's poſſeſſion, Near Bow- " houſe-mill, Maryflats, and Seggyhole, being all parts of the " barony of Abbotſkerſe, have immemorially poſſeſſed the muirs " of Reddingrig and Whiteſiderig, as part and pertinent of their " reſpective farms; and therefore find, That the defender, the " Duke of Hamilton, as proprietor of theſe lands, is to be conſi- " dered as a joint proprietor, intitled to draw a ſhare in the divi- " ſion, according to the valued rent of theſe farms; and find him " alſo intitled to a ſhare in the diviſion, according to the valued rent " of theſe farms, which are *in pari caſu* with Gilbert Laurie's " farm; and which are hereby found intitled to be continued in " poſſeſſion of their reſpective ſervitudes, till ſuch time as ſhares " ſhall be ſet off to them as aforeſaid: And find, That the ſhare " to be ſet off to the Duke of Hamilton, ſhall be burdened with " the ſervitudes due to theſe farms lying within the barony " of Abbotſkerſe, which are hereby found intitled to ſervitudes " only.

" Find,

" Find, That the family of Hamilton did, in many of the feu-
" rights granted by them to their vaſſals in the ſaid barony, re-
" ſerve privilege and liberty of working coal, ſetting down ſhanks,
" and making ways and paſſages on any part of the grounds ſo
" feued: And find it proved, and admitted, that they have been
" in uſe of working coal on the muirs now under diviſion, without
" communicating any part of the profits or tack-duties to the o-
" ther heritors; and therefore find, That in the decreet of diviſion,
" there is to be reſerved to his Grace, his heirs and ſucceſſors, the
" ſame power of working coal on the parts of the muir to be ſet
" off to thoſe whoſe rights are burdened with the reſervation a-
" bove mentioned: And find, That the decreet is to contain the
" like reſervation to his Grace, of working coal on thoſe parts of
" the muir which ſhall be ſet off to ſuch of the heritors as are
" hereby found to have only a right of ſervitude: But find, That
" after the diviſion, theſe heritors, who are hereby found to have
" rights of common property, and whoſe rights are not burdened
" with any reſervation of working coal, ſhall, in all time coming
" thereafter, have the ſole and excluſive right of working coal
" within the limits of the ſhares of the muir to be ſet off to them;
" and that his Grace ſhall have no power of working coal, or other
" minerals, thereon, &c.: And remit to the Lord Ordinary to
" proceed accordingly."

The cauſe was thereafter remitted to the Lord Juſtice-Clerk, on account of Lord Coalſton's abſence; and at a calling of this date, June 23. 1769. it was propoſed on the part of the heritors, That the foreſaid interlocutor ſhould be applied; and that it ſhould be aſcertained in which of the foreſaid three claſſes, each of the different claimants fell to be placed; and that for that end, a remit ſhould be made to the clerk, to make out a ſtate of the perſons who, from their rights, appeared to belong to theſe three different claſſes; and to report the ſame to the Lord Ordinary.

And this not having been oppoſed on the part of the Duke of Hamilton, the Lord Ordinary, of this date, pronounced the following interlocutor. June 23. 1769. " Remits to the clerk to the proceſs, or Ro-
" bert Haldane writer in Edinburgh, to make up a ſtate of the
" heritors claiming, who, from their title-deeds, appear to belong
" to the above-mentioned three different claſſes; and to report the
" ſame to the Lord Ordinary: and in the mean time, ordains the

" perſons

" perſons claiming right in the diviſion to produce their reſpective " title-deeds, in virtue of which they claim, in the clerk's hands, " betwixt and the 10th day of July next; with certification to " ſuch as ſhall fail to produce, that they will have no ſhare in the " diviſion; and appoints intimation hereof to be made by the mi- " nute-book."

The clerk having accordingly made a report of the ſtate of the different intereſts produced; and he having therein obſerved, that that it was not perfectly clear under which of the claſſes Mr Robert Hunter the memoraliſt ought to be placed, the Lord Ordinary, upon adviſing the whole, pronounced an interlocutor; which, July 13. 1770. in ſo far as concerns the memorialiſt, is in the following words. " And with reſpect to Mr Robert Hunter's claims upon the com- " mon, in right of his lands of Middlerig and Elrig, makes avi- " ſandum to the Lords; and ordains the parties intereſted in that " queſtion to give in memorials," &c.

In obedience to the foreſaid interlocutor, this memorial is humbly offered on behalf of Mr Hunter. And that your Lordſhips may be enabled to judge of the merits of the queſtion, it will be neceſſary to ſtate particularly Mr Hunter's titles, and the poſſeſſion which, in virtue thereof, he and his predeceſſors have had in the commonty in queſtion.

The memorialiſt claims an intereſt in this commonty for his lands of Middlerig and Elrig, which are two different tenements, derived from different authors, by different and diſtinct titles.

Your Lordſhips have already heard, that after the abbots of Holyroodhouſe had feued out the particular parts of the barony which now belong to the Earl of Dunmore, John Sinclair, and the truſtees of Drummond of Grange, the whole remaining lands of the barony were feued out by the commendator of Holyroodhouſe, in 1552, to the Duke of Chaſtlerault; and that, in 1611, James Marquis of Hamilton, then in the right of the Duke of Chaſtlerault, obtained from William Ballandine the ſuperiority of the whole lands contained in the feu-charter 1552.

It appears, that betwixt the foreſaid two periods, the family of Hamilton had ſold the lands of Middlerig to Sir John Bruce of Airth; and Sir John Bruce having thereafter ſold the ſame to Sir William Monteith, Sir John Bruce, according to the cuſtom of theſe days, May 25. 1611. granted a charter, of this date, in favour of Sir William Monteith, of

of the ſaid lands of Middlerig, "cum domibus, ædificiis, hortis, lie outſettis, moris, mareſiis, pratis, paſturis, annexis, connexis, partibus, pendiculis, et pertinentiis ſuis quibuſcunque," &c. And the family of Hamilton having, as has been already obſerved, acquired a right to the ſuperiority of the lands contained in the Duke of Chaſtlerault's feu, of which the lands of Middlerig were a part, James Marquis of Hamilton, of this date, grants a charter in favour of Sir William Monteith, confirming the foreſaid charter granted by his author Sir John Bruce. Aug. 14. 1621.

This charter contains a *Novodamus* in theſe words: "De novo damus, concedimus, et diſpoſuimus, memorato Domino Wilielmo Monteith de Kerſe, Militi, hæredibus ſuis maſculis, aſſignatis, et ſucceſſoribus ſuis quibuſcunque præſcript. hæreditarie et irredeemabiliter, ut ſupra, totas et integras prænominatas terras noſtras de Middlerig, cum domibus, ædificiis, hortis, lie outſettis, moris, mareſiis, pratis, paſturis, annexis, connexis, partibus, pendiculis, et pertinentiis ſuis quibuſcunque; una cum plena libertate, poteſtate, et privilegio jactandi ceſpites, vulgo of caſting fuel, fail, diffetis, et turfis, ſupra communem morum de Redding, ſolit. et conſuet.; necnon cum plena libertate et privilegio dicto Domino Willielmo, ſuiſque ſucceſſoribus, baronibus baroniæ de Weſter Kerſe, jactandi ceſpites, vulgo of caſting fuel, faill, diffetis, et turfis, ſupra præſcriptum communem morum de Redding, et eaſd. tranſportandi ad eorum libitum, pro eorum proprio uſu, et non aliorum, ſine impedimento quocunque; cum libero introitu et exitu ad præfatum morum, jacen. in noſtra barronia et regalitate de Polmont," &c.

The diſpoſition by the family of Hamilton to Sir John Bruce, with the diſpoſition and charter by him to Sir William Monteith, are not produced; but that the fact is as above ſtated, appears from the foreſaid charter of confirmation 1621.

Although the *Novodamus* in that charter does only ſpecially grant the liberty and privilege of caſting peats, turf, feal, and divot, in the common muir of Reddingrig; yet it appears that the memorialiſt and his authors in the lands of Middlerig have, for time immemorial, been in the conſtant uſe of paſturing their cattle in the ſaid commonty, without any challenge or interruption; and in ſhort have had all the uſe and poſſeſſion of this commonty, which

thoſe whoſe right of common property therein is eſtabliſhed by a final judgement of your Lordſhips, have at any time enjoyed.

State, p. 28. I. Patrick Simſon, aged 66. "being interrogated for the Profeſſor with "reſpect to the poſſeſſion had of the commonties in queſtion for his "lands of Middlerig, depones, That for above forty years paſt "he has known the tenants of the lands of Middlerig have been in "uſe to paſture and caſt feuel, feal, and divot, upon the com-"monties in queſtion."

— p. 30. F. John Bell, aged 78, depones, "That ever ſince he can remem-"ber, he knows that the tenants of Middlerig have been in uſe to "paſture, and to caſt feuel, feal, and divot, upon the commonties "in queſtion; but cannot condeſcend upon the preciſe number of "years."

Upon the above ſtate of the caſe, it is humbly ſubmitted to your Lordſhips, if the memorialiſt hath not a right of common property in the commonty in queſtion, effeiring to his lands of Middlerig.

The family of Hamilton acquired no additional right or intereſt in the property of this barony by the grant from William Ballandine in the 1611. No more was thereby conveyed, than the naked right of ſuperiority of thoſe lands which had been feued out to his predeceſſor the Duke of Chaſtelrault in 1552; ſo that all the right or intereſt which the family of Hamilton have to this day, or ever had in the property of this barony, whether the ſeveral lands or the commonty, reſts entirely upon the feu-right granted to the Duke of Chaſtelrault in 1552: and it is a clear caſe, and which the Duke of Hamilton cannot, nor ſurely will not, controvert, that when the commendator of Holyroodhouſe feued out to the Duke of Chaſtelrault his whole property in the barony of Abbotſkerſe, not formerly feued out, with parts and pertinents, that he, by that grant, had a right to the whole lands within that barony, with a right of common property in the commonty of Whiteſiderig and Reddingrig, the commonty of the barony effeiring to the ſeveral lands contained in the feu-right; and as the lands of Middlerig were part of the lands contained in the feu 1552, it muſt therefore neceſſarily follow, that the Duke of Chaſtelrault, as proprietor of the lands of Middlerig, had a right of common property effeiring to theſe lands, compared with the other lands in the barony having a right and intereſt in the commonty.

This the memorialiſt humbly apprehends muſt be deciſive of the preſent

preſent queſtion in the memorialiſt's favour: For your Lordſhips will obſerve, that the grant by the family of Hamilton in favour of the memorialiſt's author of theſe lands of Middlerig, is not a feu created by the family of Hamilton, to be held of them by Sir John Bruce. If that had been the caſe, they might have qualified the feu in what terms they thought proper; and the preſent queſtion would in a great meaſure have depended upon the conſtruction of the feu-right. But the grant by the family of Hamilton, in favour of the memorialiſt's author, was a total alienation of the lands of Middlerig. They had not then acqired the right of ſuperiority which they afterwards got from the Ballandines of Broughton. It does not appear that the family of Hamilton reſerved any right or intereſt whatever in the lands of Middlerig; and therefore when they granted a diſpoſition of theſe lands in favours of Sir William Bruce, with *parts and pertinents*, to be held of the ſuperior, it is plain that that diſpoſition behoved to carry not only the ſeveral lands of Middlerig, but likewiſe that right and intereſt which theſe lands had in commonty. When the family of Hamilton was totally denuded of the lands of Middlerig, they could not, without an expreſs reſervation for that purpoſe, afterwards claim any right or intereſt in the commonty on account of theſe lands. The whole right and intereſt which thoſe lands had in the commonty, behoved to paſs along with the lands themſelves, as part and pertinent thereof, to Sir John Bruce the diſponee; and as it cannot be diſputed, that the intereſt which the family of Hamilton had in the commonty, on account of the lands of Middlerig, while they remained with them, was a right of common property, the ſame right behoved to paſs along with theſe lands to Sir John Bruce the diſponee; and accordingly this conſtruction of the rights of the parties is perfectly agreeable to the poſſeſſion that afterwards followed. It appears from the proof, and indeed it is not diſputed, that the memorialiſt, and his predeceſſor, have had as full a poſſeſſion of the commonty in queſtion as any of thoſe, who, confeſſedly, have a right of common property on it.

As to the clauſe of *Novodamus* in the charter 1621, it is, with ſubmiſſion, impoſſible that it can alter the caſe. If the memorialiſt founded his preſent claim upon that *Novodamus*, there might be ſome room for maintaining, that it could give him no farther right in the commonty than a ſervitude of feuel, feal, and divot. But this is not the caſe. The memorialiſt's author had formerly an abſolute

ſolute right to the lands of Middlerig, with *parts and pertinents*, and of conſequence to a right of common property in the commonty effeiring to theſe lands; and it is plain that the *Novodamus*, however limited, could never cut the grantee out of any right which he formerly had independent of the grant. The intention of a *Novodamus* is not only to ſecure to the vaſſal what right he formerly had, but even to confer upon him new rights, which he had not formerly, in ſo far as in the ſuperior's power. But it was never heard of, that a *Novodamus* could have the effect to deprive the vaſſal of any right he formerly had in him, independent of the new grant.

What might have been the reaſon for conceiving the *Novodamus* in that manner, whether it proceeded from the ignorance and overanxiety of the vaſſal, or from the ignorance, &c. of the writer of the deed, the memorialiſt cannot take it upon him to account for at this diſtance of time. But he apprehends that it is a clear caſe, that although the ſuperior had truly thereby intended a limitation of his right, that yet it could not have the effect to deprive him of what he had a good right to, independent of that grant; and that it was underſtood that the memorialiſt's author's right was not limited by that *Novodamus*, appears from the poſſeſſion that uniformly followed ſince. It has been already obſerved, that their poſſeſſion of the commonty was not limited to the uſes mentioned in the *Novodamus*, but that they have, without challenge, had all the poſſeſſion which any of theſe having a right of common property have enjoyed.

And this leads the memorialiſt to a ſeparate obſervation, viz. That even although his author's right had, by the foreſaid *Novodamus*, been effectually limited to a ſervitude of fuel, feal, and divot, yet that, in virtue of his ſubſequent poſſeſſion, he would have acquired a right of common property by the poſitive preſcription. It is an eſtabliſhed point, that a right of common property in a commonty may be acquired by the poſitive preſcription, upon no other title than the party's infeftment in the ſeveral lands, with parts and pertinents; and if the memorialiſt, in virtue of his and his author's infeftments in the lands of Middlerig, with parts and pertinents, and the poſſeſſion which they have enjoyed, would have acquired a right of common property by the poſitive preſcription, if they had had no intereſt whatever in the commonty, he apprehends, that his formerly having a ſervitude of fuel, feal, and divot,

vot, over the commonty, would not bar him from acquiring a farther right by preſcription.

But it will be unneceſſary to inſiſt farther upon this point, as the memorialiſt humbly apprehends, that he has no occaſion in this caſe to found upon preſcription, as his author had a good right to a common property in the commonty in queſtion, by the original conveyance from the family of Hamilton of the lands of Middlerig, with parts and pertinents; and that the ſubſequent *Novodamus* could not have the effect to cut him out of a right which he had independent thereof.

With reſpect to the lands of Elrig, it is one of thoſe feus that was originally created by the family of Hamilton; and it appears, from the titles produced, to have been granted with parts and pertinents, "together with the paſturage of cattle, and *privilege of commonty*, within the bounds of the common muir of "Reddingrig, and Whiteſiderig, conform to old uſe and privilege, "lying within the barony and regality of Abbotſkerſe, and now "within the dukedom and regality of Hamilton, and ſheriffdom "of Stirling; reſerving to the Duke, and his heirs, the haill coal, "and coal-heughs, within the bounds of the ſaid lands of Elrig, "pertinents and commonty thereof, with liberty to ſet down ſinks "within any part of the ſaid lands of Elrig, except the two prin-"cipal dwelling-houſes and yards thereof, and the length of the "three pair of butts next and adjacent thereto."

What created the doubt, whether theſe lands have a right of common property in the commonty, or only a ſervitude of paſturage, &c. was the ſimilarity of the foreſaid clauſe, to the clauſe that is contained in the moſt part of the grants of the feuers who are ſtated under the third claſs, and who have been found to have only rights of ſervitude. But as the memorialiſt's poſſeſſion has in every reſpect been equal to the poſſeſſion of thoſe who have rights of common property; ſo the memorialiſt is humbly perſuaded that your Lordſhips, in this caſe, will ſee no good reaſon for reſtricting his rights to that of a ſervitude only.

Your Lordſhips will obſerve, that this queſtion becomes ſolely a queſtion betwixt the Duke of Hamilton, by whoſe predeceſſor the feu-rights in queſtion was granted, and the memorialiſt, in favour of whoſe author it was granted. For, by the judgements that have been already pronounced, where any of the feuers of the family have not a right of common property, but only that of a ſervi-

tude, the Duke has been found to be intitled to a right of common property in the commonty effeiring to ſuch lands, with the burden of ſuch ſervitude as he granted to thoſe feuers: ſo that no third party is in the leaſt intereſted, whether the memorialiſt's right has a right of common property, or of a ſervitude only.

And therefore, as this queſtion becomes in effect entirely a queſtion betwixt the granter and the grantee, your Lordſhips will determine it agreeable to what ſhall appear, from the grant itſelf, to have been the meaning and underſtanding of the contracting parties. No form of words, or *verba ſolennia*, are neceſſary to conſtitute either a right of common property, or of that of a ſervitude. The ſtyle and clauſes uſed in conſtituting theſe rights are various: both the one right and the other hath been conſtituted ſometimes in one form of words, and ſometimes in another. Sometimes the grant is curtly conceived, by conveying the ſeveral lands ſimply, with *parts and pertinents*, which your Lordſhips have in this cauſe found to carry a right of common property; and ſometimes a greater exuberancy of ſtyle is uſed; and which indeed ſeems to have given riſe to the doubt in this caſe.

And, therefore, however the words here uſed might naturally import a right of ſervitude only, if there was nothing in the grant which led to a different explanation, yet the memorialiſt can, with ſubmiſſion, have no doubt, that the words here uſed are broad enough to carry a right of common property, if it ſhould appear from the deed, that ſuch was the underſtanding of the contracting parties. The Duke of Hamilton, before the grant of the feu of Elrig, had a right to the property of theſe lands, with a right of common property in the commonty effeiring to them; and therefore, when he feus out theſe lands, *with the privilege of commonty* within the bounds of the common muir of Redding, &c. *conform to old uſe and privilege*, theſe words are, in the memorialiſt's humble apprehenſion, ſufficient to convey the whole right and intereſt which theſe lands had in the commonty, eſpecially if it did appear that ſuch was the intendment of the granter.

And that it was underſtood by the granter, that he thereby did confer a right of common property, appears clearly from the ſubſequent part of the clauſe; by which he reſerves to himſelf, and his heirs, "the haill coal and coal-heughs within "the bounds of the ſaid lands of Elrig, pertinents and com-"monty thereof." By this part of the clauſe it is clear, that the granter underſtood that the lands of Elrig had a right of property

property in the commonty, and that that right was thereby conveyed to the feuer. It is plain, that a ſervitude of paſturage, which is no more than a mere ſuperficial right, could never intitle the grantee to work coal, or any other minerals; and therefore, when the Duke made an expreſs reſervation of the coal in the lands of Elrig, *pertinents and commonty thereof*, it is plain that he underſtood that, without that reſervation, the coal would have belonged to the feuer: from which it muſt neceſſarily follow, that he farther underſtood, that when he conveyed the privilege of commonty, *conform to old uſe and privilege*, he thereby conveyed a right of property in the commonty effeiring to the lands of Elrig, and which he, as proprietor of the lands of Elrig, had a right to.

And here your Lordſhips will pleaſe attend to the terms of the original feu-charter that was granted in 1552 by the commendator of Holyroodhouſe to the Duke of Chaſtelrault. In the *Tenendas* of this charter there is the following clauſe: "Cum communi paſtura, "libero introitu et exitu, et cum omnibus aliis et ſingulis liber-"tatibus, commoditatibus, proficuis, aſiamentis, et juſtis ſuis perti-"nen. quibuſcunque." Taking this clauſe by itſelf, without any thing farther to explain it, it would naturally have imported a ſervitude of paſturage only over the commonty: but as the commendator, by that grant, was giving away the whole property he had within the barony, ſo that it could not be ſuppoſed he meant to reſerve any intereſt in the commonty, when he was proprietor of no lands having an intereſt in the commonty; ſo this grant has been accordingly underſtood, and held to import a grant of common property in the commonty effeiring to the ſeveral lands thereby conveyed.

The memorialiſt ſhall not trouble your Lordſhips farther, as nothing has been hitherto ſtated upon the part of Duke Hamilton againſt the preſent claim: and he humbly hopes, that, upon the whole, your Lordſhips will have no difficulty to find, that the memorialiſt has a right of common property in the commonty in queſtion, effeiring to both his lands of Middlerig and Elrig; and that there is no good reaſon for limiting his right to that of a ſervitude only.

In reſpect whereof, &c.

RO. MACQUEEN.

MEMORIAL